

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 03-101

August 5, 2003

TO: All Regional Directors, Officers-in-Charge
and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Modification to Rules Concerning Filing of Appeals

On July 3, 2003, a Notice was published in the Federal Register announcing revisions of extant rules and regulations applicable to filing of appeals to Regional Directors' refusal to issue, or reissue, complaint.¹

Section 102.19(a) of the National Labor Relations Board's rules had provided that if a Regional Director declines to issue complaint, or after withdrawing a complaint refuses to reissue it, the person making the charge may obtain review of the action by filing an appeal (or seeking an extension of time in which to file an appeal) within 14 days of being notified in writing by the Regional Director of the reasons for the decision. Significantly, Section 102.19(a) had instructed that the appeal "shall" contain a complete statement setting forth the facts and reasons upon which it is based. The requirement that a complete and separate statement must be submitted in order to constitute an appeal is being eliminated.

Despite the seemingly mandatory language of Section 102.19(a), the Office of Appeals has, for many years, accepted the "Appeal" form (Form NLRB-4767) attached to the Regional Director's dismissal letter as an appeal and sent acknowledgement to the parties based on a timely filing of such form. The policy was developed in response to the reality that many individual appellants do not have the language skills to perfect a more traditional appeal. In *Grand Rapids Gravel Company*, JD-114-02 (issued November 22, 2002)², an administrative law judge specifically rejected the assumption "that the filing of a notice of appeal is legally tantamount to the filing of the actual appeal." Slip op. p. 20. In order to avoid future challenges concerning the viability of an appeal based only on a notice, the rules and regulations and related forms have been revised to reflect the actual practice. Because the current practice is fairer to individual, unrepresented charging parties, the language applicable to the procedures for filing an appeal has been revised to reflect that practice and to make the public aware of the

¹ The Federal Register Notice can be found under the "Public Notices" button on the Agency's internet website.

² In the absence of exceptions, the Board adopted the decision on February 27, 2003.

actual practice.³ Once a case is appealed, the same level of review is afforded despite the brevity of an appeal.

Accordingly, Section 102.19(a) has been modified, in relevant part, to state:

...The person making the charge may obtain a review of such action by filing the "Appeal Form" with the General Counsel in Washington, DC, and filing a copy of the "Appeal Form" with the Regional Director, within 14 days from the service of the notice of such refusal to issue or reissue by the Regional Director, except as a shorter period is provided by section 102.81. If an appeal is taken the person doing so should notify all other parties of his action, but any failure to give such notice shall not affect the validity of the appeal. The person may also file a statement setting forth the facts and reasons upon which the appeal is based. If such a statement is timely filed, the separate "Appeal Form" need not be served. A request for extension of time ..."

Form NLRB-4767 is now entitled "Appeal Form" rather than its former designation of "Notice of Appeal." See the attached revised form. In addition, the first paragraph has been revised from "an appeal is being taken" to "an appeal is hereby taken." This modification will remove any ambiguity as to whether the form is merely advising parties that a separate appeal is being filed. Instead, the form itself will be sufficient to effect an appeal if timely filed. Alternatively, any written statement indicating an intent to appeal is sufficient to constitute an appeal if timely filed. This is true even if such statement is unaccompanied by Form NLRB-4767.

Form NLRB-4938 has likewise being modified to indicate that a statement explaining the basis for the appeal would be helpful though not required. See the attached revised form. In addition, the second paragraph of Form NLRB-4938 has been deleted in its entirety.⁴

Corresponding modifications have also been made to the Casehandling Manual (Part 1). The third paragraph of Section 10122.4 of the Manual will be revised to reflect that Form NLRB-4767 by itself constitutes an appeal. The paragraph would read "All dismissal letters should include Form NLRB-4767, Appeal Form, and request that the person filing an appeal use such forms to notify the other parties. The General Counsel's acknowledgement of the filing of an appeal, as well as any ruling on a

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⁴ That paragraph indicates that copies of the former Notice of Appeal form (Form NLRB-4767) should be sent to all other parties "at the same time" that the appeal itself is filed and that mailing the form does not relieve the party seeking review from filing the appeal itself with the General Counsel and Regional Director. The provisions of that paragraph conflict with the actual practice of the Office of Appeals.

request for an extension of time to file an appeal will be served on all parties. Sec. 102.19, Rules and Regulations.”

Some Regions issue letters setting forth the appeal rights in the body of the text rather than attaching Form NLRB-4938. Manual Section 10122.14 sets forth suggested language for dismissal letters. The *Appeal Contents* paragraph of such letters currently states, “This appeal *must* contain a complete statement setting forth the facts and reasons why you believe the decision to dismiss your charge was incorrect.” (Emphasis added.) The new language will be:

Appeal Contents: You are encouraged to submit a complete statement setting forth the facts and reasons why you believe the decision to dismiss your charge was incorrect. However, the enclosed Appeal Form (NLRB-4767) by itself will be treated as an appeal if timely filed upon the General Counsel and me.

In the letters incorporating the procedures, the word “must” has been changed to “should” in the first sentence in the paragraph labeled *Notice to Other Parties of Appeal* so that the sentence would state that. “You should notify the other party(ies) to the case that an appeal has been filed.” Moreover the last two sentences of this paragraph, suggesting a separate appeal is required apart from Form NLRB-4767, have been deleted. Thus, the new paragraph will state:

Notice to Other Parties of Appeal “You should notify the other party(ies) to the case that an appeal has been filed. Therefore, at the time the appeal is sent to the General Counsel, please complete the enclosed Appeal Form (NLRB-4767) and send one copy of the form to all parties whose names and addresses are set forth in this letter.”

If you have any questions regarding this memorandum, please contact your AGC or Deputy or the undersigned.

/s/
R.A.S.

Attachments
cc: NLRBU
Release to the Public

MEMORANDUM OM 03-101



nlrb4767.pdf



nlrb4938.pdf